

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

(Tracy, California)

EVERGREEN NEW HOPE HEALTH &
REHABILITATION CENTER

Employer

and

Case 32-RC-4776

LOCAL 250 HEALTH CARE WORKERS
UNION, SERVICE EMPLOYEES
INTERNATIONAL UNION (SEIU), AFL-CIO,
CLC

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly being filed under Section 9(c) of the National Labor Relations Act, as amended, herein called the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

4. Petitioner claims to represent certain employees of the Employer, and a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. Petitioner is currently recognized by the Employer in a bargaining unit consisting of all full-time and regular part-time nurses aides, certified nursing assistants, dietary employees including cooks, housekeepers, maintenance employees, laundry employees, activity assistants, and janitors employed by the Employer at its facility located at 2586 Buthmann Avenue, Tracy, California; excluding professional employees, technical employees, business office clerical employees, dietary/supervisor cooks, guards and supervisors as defined by the Act.

Petitioner seeks by means of an *Armour-Globe*¹ self determination election to add to this unit a residual unit consisting of licensed vocational nurses, subject to the majority of the votes being cast in favor of Petitioner.

6. Contrary to the Petitioner, the Employer contends that the licensed vocational nurses, all of whom serve as charge nurses, are supervisors within the meaning of Section 2(11) of the Act, and should be excluded from the unit.

THE FACTS

The Employer,² a skilled nursing facility, provides 24-hour "total care" convalescent health care services to dependent patients. Licensed vocational nurses (LVNs) serve as charge nurses, alongside Registered Nurses (RNs) who also serve as

¹ See, *Globe Machine & Stamping Co.*, 3 NLRB 294 (1937); *Armour & Co.*, 40 NLRB 1333 (1942); see also *Ten Broeck Commons*, 320 NLRB 806, 814 (1996) (Board ordered a self-determination election to include licensed practical nurses ("LPNs") in an existing service and maintenance unit, while noting that whether a separate technical unit of LPNs is appropriate in a non-acute care facility such as a nursing home is an issue decided on the facts of each case requiring additional litigation.)

charge nurses.³ Nine LVNs are employed as charge nurses.⁴ (Hereinafter, "charge nurse" and "LVN" are used interchangeably.) The facility has 99 beds, and is divided into two sections, the North wing and the South wing, both of which contain a charge nurse station. At least two charge nurses are always on duty, and during the day, there are usually four charge nurses on duty, two on each wing. Charge nurses work in three shifts: day shift, p.m. shift, and night shift. At least one RN is always on duty during the day shift; another RN is usually, but not always, on duty during the p.m. shift.

Certified Nursing Assistants ("CNAs") and charge nurses work the same three shifts. Charge nurses generally work the following hours: two nurses work 6:30 a.m. to 3:00 p.m.; two work 8:00 a.m. to 4:30 p.m.; at least two work the p.m. shift; and two work 10:30 p.m. to 7 a.m. In addition, "spot" charge nurses may support a particular section from 5:00 to 9:00 p.m. Approximately 10 CNAs work during the day shift, seven or eight on p.m. shift, and five at night. CNAs start at \$8 hour; charge nurses earn approximately two to two and one-half times more than CNAs.

The Executive Director, the Director of Staff Development ("DSD"), and the Director of Nursing Services ("DNS") are present at the facility during the day and part of the p.m. shifts. The DNS, Barbara White, testified that she oversees all patient care and nursing, including the nurses in charge, making sure everyone is "on task." She is

² Evergreen Health Care took over managing the facility in September 1998, and acquired ownership on February 14, 2000.

³ Although the Employer's evidence suggests that RNs and LVNs occupy the same job classification of charge nurse, Petitioner does not seek to represent the RNs through this petition. Therefore, the supervisory status of the RNs is not at issue in this proceeding. In addition to the difference in their educational and licensing requirements, the record reveals that RNs are paid approximately \$3.00 to \$5.00 per hour more than LVNs, provide additional medical treatments to patients, and are consulted by LVNs concerning patient care and administrative matters.

⁴ No contentions are raised by either party that any particular LVNs are endowed with or exercise more authority than others. For purposes of this analysis, I assume that the duties and authority of individual LVNs evidenced in the record are shared similarly by all LVNs.

usually at the facility during the day shift and some of the p.m. shift. White hires the charge nurses, and occasionally holds "in-service" meetings with them, in which she informs them of new treatments and services. White testified that the charge nurses provide "clinical supervision" of the CNAs, and that they are evaluated, in part, on their supervisory skills. The DSD, Sally Armstrong, is responsible for hiring and scheduling CNAs. Either the DSD or the DNS is available to consult with the charge nurses by phone 24 hours a day.

The charge nurse is responsible for overseeing patient care in her assigned section, which includes implementing the prepared patient care plan and making sure patient care is properly provided by the CNAs. Charge nurses also distribute medicines and provide medical treatment to patients as prescribed in the patient care plans, update patient charts, coordinate and prepare for patient transfers to other facilities, assess patients' conditions, take vital signs, and modify patient care plans subject to the approval of the DNS. Patient care plans are designed by the DNS, with direct input from the charge nurses. CNAs provide direct care services to patients, including feeding, bathing, walking, turning, and other services as prescribed.

The charge nurses on duty may accommodate a patient's needs or requests by reassigning a particular CNA to a different patient. Regular assignments of CNAs to sections and patients are made by the DSD. When problems arise, the charge nurse is "in charge" of taking care of the problem, which includes giving advice to the CNAs about the care the CNAs provide. When problems are not solved informally, the Employer relies on the charge nurse to bring the problem to the attention of the DSD and DNS. Anyone on the floor is responsible for reporting problems. The DNS often asks

the charge nurse to prepare a formal written statement documenting an alleged incident of misconduct. This statement is attached to the written disciplinary report provided by the DNS to the CNAs when she counsels the employee.

POSITIONS OF THE PARTIES

The Employer contends that the LVNs who serve as charge nurses are supervisors within the meaning of Section 2(11) of the Act and, as such, should be excluded from the bargaining unit. In support of this contention, the Employer asserts that the LVNs assign work to and responsibly direct the CNAs, discipline or effectively recommend discipline of CNAs, and have authority to suspend CNAs and to resolve their grievances, in the Employer's interest, using the requisite independent judgment. The Employer notes that the parties have explicitly excluded the LVNs from the bargaining unit throughout the history of bargaining between the parties, pointing to the collective bargaining agreement's unit definition which excludes "other Supervisors, as defined in the Act as amended" as instructive. The Employer also urges that the absence of other supervisors during a significant portion of the work day should be dispositive of supervisory status.

The Union argues that, the LVNs are not supervisors, because, although LVNs have some discretion concerning patient care, they have no discretion over their own working conditions or the working conditions of the CNAs, and LVNs have no power to effectively recommend employment actions concerning the CNAs.

ANALYSIS

The party asserting that individuals are supervisors under the Act bears the burden of proving their supervisory status. *Youville Health Care Center, Inc.*, 326 NLRB No. 52 (1998); *Bennett Industries, Inc.*, 313 NLRB 1363 (1994); *Tuscon Gas and Electric Co.*,

241 NLRB 181, 181 (1979). The possession of any one of the indicia specified in Section 2(11) of the Act is sufficient to establish supervisory status, provided that such authority is exercised in the employer's interest, and requires independent judgment in a manner which is more than routine or clerical. *Harborside Healthcare, Inc.*, 330 NLRB No. 191 (2000); *Youville Health Care Center, Inc.*, *supra.*; *Hydro Conduit Corp.*, 254 NLRB 433, 437 (1981). The exercise of some supervisory authority in a merely routine, clerical, perfunctory, or sporadic manner, however, does not confer supervisory status on employees. *Chicago Metallic Corp.*, 273 NLRB 1677 (1985); *Advanced Mining Group*, 260 NLRB 486, 507 (1982). Because supervisory status removes individuals from the protection of the Act, only those personnel vested with "genuine management prerogatives" should be considered supervisors, and not "straw bosses, leadmen, set-up men and other minor supervisory employees." S.Rep.No. 105. 80th Cong. 1 Sec. 4 (1947); *Ten Broeck Commons*, *supra.* at 809. Whether nurses possess supervisory authority is analyzed on a case-by-case basis using the same criteria applied to workers in other occupations. *Ten Broeck Commons*, *supra* at 809-810. *Providence Hospital*, 320 NLRB 7171 (1996), *enfd. sub nom. Providence Alaska Medical Center v. NLRB*, 121 F.3d 548 (9th Cir. 1997); see also *NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571, 583 (1994). In the instant matter, the Employer has failed to establish the supervisory status of the LVNs in question.

Assignment and Responsible Direction of CNAs

On a monthly basis, the DSD assigns particular CNAs to shifts, sections of the facility, and particular patients. These assignments are made based on the guidelines in the collective bargaining agreement, input from the CNAs themselves, patient need, and

staff availability. There is no evidence that the LVNs have any role in creating the monthly schedule of the CNAs' assignments. Schedules for charge nurses are set by the DNS, in consultation with the Executive Director.

Patient care plans are designed by the DNS with input from the charge nurses. Charge nurses draft modifications to the patient care plans based on their observations of the patients' needs, which are subject to approval by the DNS. Patient care plans describe all the services a patient will receive, including those services provided by CNAs.

CNAs have been instructed to call the charge nurse at the North wing station when they call in to report that they will be out. The charge nurse is responsible for calling in an off-duty CNA to replace the absent person. The charge nurse does not normally notify a director before calling a replacement CNA. Calling in is done from a predetermined seniority list in accord with the collective bargaining agreement; charge nurses have no discretion concerning whom is called in. Charge nurses do not have authority to send CNAs home if the shift is slow or overstaffed on a particular day or night, or to require anyone to report for duty when called in. If a CNA must leave early due to illness or a personal emergency, charge nurses are not authorized to require them to stay. The CNA will tell the charge nurse they have an emergency, and the charge nurse will call and inform the DNS. Charge nurses cannot authorize overtime, although they have some discretion to identify the need for overtime and request authorization from the DSD. The charge nurses are empowered to make some temporary assignment changes during their shifts to ensure the shift run smoothly. For example, if a particular patient does not get along with a particular CNA, or if a female patient prefers receiving a service from a female CNA, the charge nurse can accommodate that patient by

switching an assignment on that shift from one CNA to another. The CNAs' breaks are predetermined, and the charge nurse is not empowered to call a CNA back early from a break, or prevent someone from taking a break, even in an emergency. The charge nurses may temporarily reassign an on-duty CNA to the work of the on-break CNA if necessary to effectuate proper patient care. CNAs report to the charge nurse when they arrive and when they leave for breaks. When the CNAs are very busy, and charge nurses have completed their work, charge nurses assist CNAs with their patient care assignments.

The Board has long-recognized that some highly skilled employees whose primary function is participation in the production or operating processes who incidentally direct the movement or operations of less skilled subordinate employees, nevertheless are not supervisors, because their authority is based on their working skills and experience. *Ten Broeck Commons, supra* at 808-809 (internal citations omitted). At issue is whether the direction they provide requires independent judgment or whether the directions are merely routine. *Id.* I find, consistent with the Board's precedent, that the duties performed by LVNs as evidenced in the record, do not require the independent judgment as required by Section 2(11), but resemble the work of leadpersons and other skilled employees with only limited authority. *Id.*; see also, *Beverly Manor Convalescent Center*, 275 NLRB 943, 947 (1985); *Providence Hospital, supra.* Workday tasks are governed by the patient care plans, the implementation of which does not require independent judgment. Any role the LVNs play in monitoring and adjusting for breaks or replacing absent employees is merely routine. Moreover, actual assignments of CNAs are done by the DSD, and LVNs have no role in that process.

Additionally, the Employer argues that, because LVNs are responsible for ensuring proper patient care, it "follows that should an LVN fail to ensure that proper patient care is being provided by the CNAs, the LVN's employment may be negatively impacted." The DNS testified that supervisory skills are considered in a charge nurse's evaluation, and supervisory skills are listed in their job description. However, the Employer has provided no evidence that any LVN's job has ever been impacted negatively by poor performance or misconduct of a CNA on his or her shift. Without evidence, I cannot on this record determine that LVNs are held accountable to the Employer for the performance of CNAs in their charge.

I find, therefore, that the Employer has failed to demonstrate that the LVNs who work as charge nurses assign or responsibly direct CNAs within the meaning of Section 2(11).

Disciplining, Evaluating and Suspending CNAs.

The DNS testified that charge nurses recommend discipline of CNAs in the form of reporting problems and recommending formal "write ups" of employees. Individual LVN's testified that they do not recommend discipline of CNAs on their shifts. However, it is uncontested that charge nurses including LVNs are asked to report serious infractions or ongoing problems with CNAs to the Directors, and, at least on occasion, are asked to prepare written statements describing the misconduct or patient abuse they witnessed. LVN Louise Atienza reported to DNS White on one occasion that either she wanted a particular problem employee off her shift, or that something needed to be done about that CNA. LVN Jean Goddard testified that, on one occasion, she had reported concern about the quality of a CNA's work to the DNS and was asked to provide a

written description, but not a recommendation for discipline. Although the DNS testified that charge nurses regularly reported infractions and wrote statements recording these problems, she could only specifically recall two such incidents..

It is clear that decisions concerning disciplinary actions taken by the Employer are made by the DNS or the DSD. Written statements prepared by the LVNs are records of the LVN's observations which do not contain any explicit recommendations for action. The DNS testified that the collective bargaining agreement precludes discretion in discipline in most cases. Moreover, the Employer concedes that the Director independently investigates allegations of misconduct and talks to the employee directly about the incident reported. Although the Employer claims that charge nurses are sometimes present in the disciplinary meetings held by the DNS with the employee in question, the record does not reveal any specific time when that occurred or indicate any role the LVN might have played beyond reporting the incident to the DNS.

I find that the record does not demonstrate that LVNs discipline employees, and to the extent their reports and complaints may be construed as recommendations for discipline, they have not been shown to be effective recommendations, in that the Employer independently investigates the allegations, there is no recommendation recorded on the written statements, and there is no record evidence that the Employer has ever taken action solely on the recommendation. *Ten Broeck Commons, supra.*; see also *Hawaiian Telephone Co.*, 186 NLRB 1 (1970); *Pepsi Cola Bottling Co.*, 154 NLRB 490, 493-495 (1964); cf. *Hillhaven Kona Healthcare Center*, 323 NLRB 1171 (1997). Moreover, mere suggestions do not amount to effective recommendation. See *Brown & Root*, 314 NLRB 19 (1994).

It is undisputed that charge nurses including LVNs complete "Certified Nursing Assistants Observation" forms at the direction of the Director in which the charge nurse records whether proper care is being provided by individual CNAs in a variety of specific categories, and notes deficiencies or particular strengths in care. Although it is unclear how regularly the forms are completed, it is clear that the DSD used them as one source of information in drafting employee annual evaluations, which are also based on her personal observations. Sometimes the observation forms are used to record the performance of a particular CNA who is either new or having problems that required monitoring, but there is no evidence that these evaluations affected any CNA's wage or job status; in fact, the record indicates that wage rates are governed by the collective bargaining agreement, and not by the evaluation process.

When employee evaluations do not affect wages or job status, the individual performing the evaluation will not be found to be a statutory supervisor. *Harborside Healthcare, Inc.*, 330 NLRB No. 191; see also *Elmhurst Extended Care Facilities*, 329 NLRB No. 55 (1999). Here the Employer has failed to demonstrate the critical link between employee evaluations and any effect on job status. See *Crittenton Hospital*, 328 NLRB No. 120 (1999); *Ten Broeck Commons*, supra. Therefore, I find that the evaluations of CNAs completed by LVNs do not confer on them supervisory status.

I further find that the LVNs do not have authority to suspend employees within the meaning of Section 2(11). The record indicates that the Employer believed it had instructed charge nurses that they had the authority to send a CNA home without pay when his or her gross misconduct put patients in jeopardy or who engaged in severe patient abuse. The employee sent home would be instructed to return the next day and

report to the Director for further action. The charge nurse would call the DNS or DSD either before or immediately after sending the employee home. In contrast, several LVNs testified that they did not believe they had that authority. There is no written policy providing LVNs with this authority. Moreover, there is no evidence in the record that any LVN ever sent a CNA home based on this purported authority. I find it unnecessary to reconcile the discrepancy in the record concerning whether charge nurses were granted this authority, because, even if this authority is vested in the charge nurses, I find it is not sufficient to confer on them supervisory authority. See *Connecticut Light & Power*, 121 NLRB 768, 770 (1958) (the mere issuance of a directive setting forth supervisory authority is not determinative of supervisory status). Ultimately, any employment action taken against an employee as a consequence of misconduct is determined by the Director, in accord with the collective bargaining agreement's progressive discipline system. The Board has determined in similar cases that the exercise of such sporadic authority is not itself enough to confer supervisory status. See *Brown & Root*, supra.

For these reasons, I find the Employer has failed to demonstrate that LVNs effectively recommend discipline, provided evaluations which can effect an employee's job status, or suspend employees within the meaning of Section 2(11) of the Act.

Resolution of Grievances

Although the Employer argues that the LVNs play a role in resolving employee grievances, I note an absence of any record evidence supporting this contention. Charge nurses, including LVNs, are charged with resolving problems that arise during their shift with respect to providing patient care. However, there is no evidence that they play any role in resolving employee grievances with the Employer. In fact, the grievance

procedure outlined in the collective bargaining agreement explicitly requires complaints to be brought to the DSD and charge nurses have no role in the grievance process. I conclude, therefore, that charge nurses do not exhibit this statutory indicator of supervisory status.

Secondary Indicia of Supervisory Authority

Secondary indicia of supervisory authority may be considered in a close case. As I have found no primary indicia of supervisory authority, it is not appropriate to rely on the secondary indicia to find supervisory status under the Act. Moreover, the secondary indicia of supervisory authority are not persuasive one way or the other.

The Employer argues that the parties' collective bargaining history supports its contention that the LVNs are supervisors, however, beyond a bald assertion, it has offered no evidence to support its contention other than the reference in the collective bargaining agreement to "other supervisors" as being excluded from the unit. The Employer also argues that, if charge nurses are not deemed supervisors, then the untenable reality would be that for significant portions of the day, sometimes as much as half of the day, there would be no supervisors on the premises, and offers evidence that their higher pay supports its contention that LVNs are supervisors. However, the ratio of supervisors to employees is not helpful in this case (about 4 supervisors to 10 CNAs day shifts, and 2 supervisors to 5 CNAs night shifts if charge nurses were supervisors; 1 supervisor to 10 CNAs days and 1 (absent) supervisor to 5 CNAs night shift if LVNs are not supervisors), and the Employer has not shown that the pay differential is a result of supervisory responsibility rather than technical skill.

Based upon the foregoing, I conclude that the classification of licensed vocational nurses (LVNs) serving as charge nurses is not one which is supervisory within the meaning of Section 2(11) of the Act.

Accordingly, I shall direct a self-determination election among the following employees:

All full-time and regular part-time licensed vocational nurses (LVNs) employed by the Employer at its Tracy, California facility; but excluding all other employees, guards, professional employees, and supervisors as defined by the Act.

If a majority of ballots are cast for the Petitioner, they will be taken to have indicated the employees' desire to be included in the existing unit of all full-time and regular part-time nurses aides, certified nursing assistants, dietary employees including cooks, housekeepers, maintenance employees, laundry employees, activity assistants, and janitors employed at the Tracy, California facility; excluding professional employees, technical employees, business office clerical employees, dietary/supervisor cooks, guards and supervisors as defined in the Act. If a majority of valid ballots are not cast for representation, they will be taken to have indicated the employees' desire to remain unrepresented. In any event, an appropriate certification will issue.

There are approximately 9 employees in the voting group.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the voting group found appropriate at the time and place set forth in the Notice of Election to be issued subsequently, subject to the Board's Rules and

Regulations.⁵ Eligible to vote are those in the voting group who are employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military service of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible to vote shall vote whether or not they desire to be represented by Local 250, Health Care Workers Union, Service Employees International Union (SEIU), AFL-CIO, CLC.

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359, 361 fn. 17 (1994). Accordingly, it is hereby directed that within seven (7)

⁵ Please read the attached notice requiring that election notices be posted at least three (3) days prior to the

days of the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all eligible voters shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the NLRB Region 32 Regional Office, Oakland Federal Building, 1301 Clay Street, Suite 300N, Oakland, California 94612-5211, on or before August 7, 2000. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed .

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570.

This request must be received by the Board in Washington by August 14, 2000.

Dated at Oakland California this 31st day of July, 2000.

/s/ James S. Scott

James S. Scott, Regional Director
National Labor Relations Board
Region 32
1301 Clay Street, Suite 300N
Oakland, California 94612-5211

Digest Numbers:

177-8520-0800-0000
177-8520-1600-0000
177-8520-2400-0000
177-8520-3900-0000
177-8520-4700-0000
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